No. 409

In the Supreme Court of the United States

OCTOBER TERM, 1943

TENNESSEE COAL, IRON & RAILROAD COMPANY, PETITIONER

v.

MUSCODA LOCAL NO. 123, ETC., ET AL.

SLOSS-SHEFFIELD STEEL & IRON COMPANY, PETITIONER

v.

SLOSS RED ORE LOCAL NO. 109, ETC., ET AL.

REPUBLIC STEEL CORPORATION, PETITIONER

v.

RAIMUND LOCAL NO. 121, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, INTERVENER

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Reduction of Hours of Work, International Labor Conference, Report No. 4, vol. V: Coal Mines, 1935, pp. 31–32 56
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OPINIONS BELOW

The opinion of the District Court (R. 494–506) is reported in 40 F. Supp. 4. The opinion of the Circuit Court of Appeals (R. 4938–4942) is re-

ported in 135 F. (2d) 320; its opinion denying the petition for rehearing (R. 4997–5010) is reported in 137 F. (2d) 176.

JURISDICTION

The petition for writ of certiorari was filed October 4, 1943, and granted November 15, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether time spent by metal miners in traveling underground in mines to and from the "working face" constitutes employment or work for which compensation must be paid under the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act (Act of June 25, 1938, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201)) are as follows:

> SEC. 3 (g). "Employ" includes to suffer or permit to work.
>
> SEC. 3 (j). "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in

any process or occupation necessary to the production thereof, in any State.

SEC. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

Petitioners have confined their "statement of the case" to matters which might support their claim of an alleged traditional practice in their mines to compute working time on a "face to face" basis.[1] Not only are the statements incom-

[1] The phrases "face to face" and "portal to portal" are commonly used as shorthand terms of reference in describing the basis of payment of miners. The "face to face" basis includes only time spent at the place where the miner actually drills and loads—the so-called "working face." The "portal to portal" basis includes time spent in traveling between the portal or entrance to the mine and the working "face", as well as the time spent in actual productive work at the "face."

plete on this aspect of the case, but, more importantly, they make only passing superficial reference to the most pertinent and significant evidence in the record—evidence showing what the employees do and the conditions to which they are subjected during the time in question. Accordingly this additional statement of facts is deemed necessary.

This action was instituted under the Federal Declaratory Judgments Act (c. 512, 48 Stat. 955, sec. 274D, 28 U. S. C., sec. 400) by petitioners, three metal mining companies (The Tennessee Coal, Iron & R. Co., a wholly owned subsidiary of the United States Steel Corp. (R. 928); the Sloss-Sheffield Steel & Iron Co., and Republic Steel Corporation) operating a total of 12[2] red ore mines in Jefferson County, Alabama (R. 556). Petitioners sought a declaratory judgment as to their liability under Section 7 of the Fair Labor Standards Act for time spent by the miners descending and traveling underground to and from the working "face." The several labor unions and union officials representing petitioners' employees were named as defendants and the administrator of the Wage and Hour Division was invited to intervene. Upon petition of the Ad-

[2] The Tennessee Company operates eight (these mines are in 3 divisions: Muscoda, including two mines, Nos. 6 and 4; Ishkooda, including two, Nos. 11 and 13; Wenonah, including four, Nos. 7, 8, 9, and 10) (R. 26, 28); Republic operates two (Raimund and Spaulding) (R. 179), and The Sloss Company, two (Sloss Red Ore and Ruffner (R. 117, 118).

ministrator, the District Court permitted the intervention (R. 304–305).

A. NATURE AND CONDITIONS OF THE UNDERGROUND TRAVEL IN PETITIONERS' MINES

Although there are slight variations in the operating methods of the 12 mines involved here, the conditions with respect to the travel time are substantially similar. For many years, at all the mines except the two operated by the Sloss Company,[3] the miners have been required to check in and hang up individual brass checks, furnished by the companies, on a tally or check-in board (R. 787, 1201, 1673, 1710–1711, 2389, 2432, 2509, 2515, 2658, 2733, 2741, 2745, 2880, 3022, 3087). The check-in board at the tally house graphically informs the mine foremen, the assistant mine foremen, head miners, or foremen of the particular service crews, if and when all the members of the respective crews are "on the job" and ready for work (R. 561, 787, 963, 3043–3044). At this point the appropriate representative of the company will make provision for vacancies in the working crew (R. 561, 787, 2432, 2509, 2734, 2739, 3031, 3043–3044, 3099), and will instruct the crew or its head miner to change the regular working place should that be necessary and give additional operating instructions (R.

[3] At the Sloss mines the employee formerly went to the tally house and "would tell the boss man 'I am here'" (R. 2797).

561, 2740, 2741, 2746, 2728–2731, 2880, 2917, 2958–2959, 3032, 3097, 3114). Numerous witnesses testified that the head miners are told by the mine foremen at the tally house or in its immediate vicinity how to proceed with their day's work (R. 2515, 2728–2730, 2740, 2746), how to overcome certain problems confronting them in their mining operations (R. 2515–2516, 2740–2741), where to obtain needed tools, equipment, timber, and supplies (R. 2402, 2730, 2743, 2752, 2959), and are given additional information not only related to their jobs but absolutely indispensable to their successful performance. As a foreman of one of the Tennessee Company's mines said, "I figure after I checked in, I am subject to orders and the men are subject to my orders" (R. 3110, 3099). A head miner at another of the Tennessee Company mines stated that the tally house "is where I get my orders, if there was any changes to be made"—changes in "the way we might work" as well as changes in working places (R. 2515).[4] At the tally house, the men not only check in, but pick up, every day or two, the carbide (R. 779, 1084, 1156, 1228, 1264, 1717) or the

[4] The giving of instructions on the surface and the carrying of tools from the surface were not "infrequent, casual and sporadic," as claimed by petitioners (Tennessee Company br. 36–37). Although such instructions may not have been given every day, the witnesses testified that they were given "lots of times" (R. 2740) and "very often if we had a bad top, a dangerous top" (R. 2516).

battery lamps (R. 3023–3024)[5] to furnish the necessary light for their underground work. These supplies (carbide or lamps) are invariably carried down by each miner during his descent from the surface. In some of the mines, many of the "production" men frequently pick up on the surface near the portal various other tools and supplies required for the performance of their work underground, and carry these tools and supplies on their underground journey to the "working face" (R. 1438–1440, 1693, 2882, 2894–2895, 2963, 3117, 3155).[6]

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[5] The men purchased the carbide "at cost" from the companies (R. 780); the battery lamps, weighing 6 to 8 lbs. (R. 2956), used in the Republic Company mine are rented to the miner each day (R. 3024).

[6] Although admittedly most of the heavy equipment was sent down into the mines by the service crews, the evidence indisputably shows that production men regularly and frequently carried tools from the surface down into the mine. At all of the mines, of course, the carbide or battery lamps were regularly carried down by every underground miner. In addition, other supplies such as hangers, wedges, drill bits, C hooks, and jackhammer steel were frequently carried down into many of the mines. At the Tennessee Company mines in the Muscoda Division, which are the biggest mines on the mountain (R. 1723), employing 1,000 underground men (R. 1669), the production men regularly (since 1938) carried hangers, wedges, jackhammer steel, and C hooks from the tool house on the surface down into the mines (R. 1693–1698, 2743, 3117, 3121). At the Sloss mine No. 2, men regularly picked up hangers, wedges and bolts from the tool box on the surface and carried them down into the mine (R. 2895, 2963). At the Sloss Company's Ruffner mine, the miner regularly carries his own "detachable bits" down with him, picking them up at the supply house or the lamp house on the surface (R. 1438–1439).

The record amply supports the District Court's finding (R. 502–503) that "the transportation was had under the strict control and supervision of the plaintiffs [petitioners]," that petitioners "prescribed the schedule of the trips, the speed of the trips, the loading of the men into the trips, and the rules of conduct during the trips, and in most cases required the men to ride the trip rather than walk." The miners are required to be checked in and at the portal of the mine ready to catch one of the regular skips [7] or man trips [8] into the mine (R. 782, 785, 1305, 3087–3088). From three to six skip trips, depending upon the size of the mine (R. 786), are made according to schedules prescribed by the management (R. 1927, 2593, 2694, 2736). In the Tennessee Company's mines, the first skip leaves the entrance a few minutes after six a. m., and the other trips follow at intervals

[7] The skip in the Tennessee mines consisted of an ordinary ore box car with four wheels on it which ran on a five foot gauge track (R. 784). It "goes down the slope fastened to a hoist rope and the other end being fastened to a hoisting engine" (R. 785). See pictures, Intervener's exhs. 3, 4, 5, 6, R. 4509–4512, 2972). When the men are riding in the cars it is known as a "man skip trip" (R. 971). A similar ore skip is used for hauling the men in the Republic Company's mines (R. 1838). See picture, Intervener's ex. no. 31, R. 4537, 3004.

[8] The Sloss Company mines have a special man trip consisting of six cars, in each of which ten men can sit (R. 1305). See picture, Intervener's ex. no. 25 (R. 4531, 2996–2997).

of 8 or 9 minutes (R. 785–786).[9] A whistle blows at six o'clock, notifying the men that the first skip will be leaving in a few minutes (R. 1264, 2659, 2734, 3353, 4599). Some of the men, particularly the drill men (R. 2375–2376), are required to go into the mine on the first man trip. In fact, the rules of the Tennessee Company expressly require drillers to leave on the first trip (*The Ore Miner*, January 1939, deft. ex. 13, p. 7, R. 4579). Mule men and others were also instructed by their foremen or superintendents to go down on particular trips (R. 2508, 2542, 2707–2708, 2749). While the other men were not explicitly assigned to a particular trip, of necessity "they scheduled themselves" to meet the company's requirement "that there be enough men there to fill a skip when we lowered it" (R. 786). By reporting late at the mine, a miner might be "disciplined, even to discharge" from the service of the company (deft. ex. 29, R. 4599).

In addition to fixing the schedule of the trips, the companies maintained regular supervision over the running and conduct of the various man trips at both the loading platform on the surface and the man loading station underground (R.

[9] In the Sloss Company mines, the first trip leaves at 6:10 or 6:15 a. m., and the other trips follow at intervals of ten minutes (R. 1305–1306). The first trip in the Republic Company's Raimund mine leaves at 5:30 a. m. and the last at 6:30 a. m. (R. 1852).

2390–91, 2814, 2864, 2661, 2692, 3034, 3158–3159, 3194–3195). The skips were not started until the mine foreman or the assistant mine foreman gave the signal to the skip tender (R. 1771, 2593, 2694, 2736, 2864). At the Sloss and Republic mines, the chainer would give the signal for the trip to be loaded or hoisted (R. 2801; deft. ex. 23, p. 25, R. 4553). "Each man had to take his turn" in loading into the skip, "they are not allowed to run in front of one another" (R. 2512–2513). As Mr. Carter (superintendent of the Tennessee Company's Muscoda Division) stated to a Union Committee in February 1936, "Any man that is caught pushing will be disciplined as men are liable to get hurt" (minutes of February 18, 1936, deft. ex. 25, R. 4556). A mine official counts the number of men entering the skip (R. 2390, 3030, 3034, 3071–3072, 3088, 3097–3098), and orders additional men to go into partially filled skips (R. 2391), or prevents men from entering skips which they deem to be fully loaded (R. 2594, 3034). The rules of the Sloss Company prescribe the precise speed of the "hoisting engine," and the number of men who shall ride at any one time (Sloss-Sheffield, *Book of Rules*, deft. ex. 20, p. 31, R. 4550). The Republic Company's rules also prescribe the number of men that may ride in a skip (Republic, *Rules for the Prevention of Accidents*, 1935, deft. ex. 23, p. 3, R. 4553.) The

management also controls the position the men must face while riding in and out of the mine (R. 1412, 2726, 2759, 3026–3028), and their smoking of cigarettes (*The Ore Miner,* May 1939, deft. ex. 18, p. 12, R. 4574). The evidence also fully supports the court's finding that the men were required to ride the trip rather than walk (R. 2650, 2501, 2528).

Whether these measures were for the purpose of safety or not, they fully warranted the District Court's finding that "Clearly, during the trips up and down the men were under the complete supervision of the plaintiffs" (R. 503).[10]

A graphic picture was presented by the numerous witnesses of the 6,000-foot ride (R. 786, 2402–2403) from the loading platform at the portal to the man-unloading station, either in ore skips or in man cars. Petitioners load 30 to 40 men in ore skips (R. 784, 1229, 1708, 1771–1772, 3026), in which the men must descend with bodies contorted and heads drawn down below the level of the skip top to avoid being crushed by the overhanging mine ceiling (R. 1708, 1709, 1833, 2395, 2490, 2641,

[10] Petitioners state that the supervision exercised over the men during the trip related only to safety. It is difficult to see what other matters would be subject to supervision during the trip. Inasmuch as the employer supervised what the men were doing, it is of no consequence that the control exercised at that time did not relate to anything else.

2693, 2726, 2759, 2788–2795, 3026–3029)." The findings of the District Court accurately summarized the above evidence as follows:

> The cars have been nearly always crowded to the extreme. The positions which the men have been required to assume during the transportation varies from a crouch with their bodies overlying one another to a rigid propping of legs and arms against the sides of the car and the fellow passengers. These positions were assumed partially because of the press of human bodies in the cars and partially because of the necessity of keeping head and body in a deflected position in order to avoid injury from collision with low points in the roofs of the mine slopes or with projections from the roofs (R. 502).

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[11] "There is not a slope on Red Mountain where the roof clears the top of the skip more than a few inches for most of the length of the slope" (*The Ore Miner*, December 1938, deft. ex. 5, R. 4455).

A head miner described the skip trip at one of the Tennessee Company's mines as follows: "They didn't have a place to sit and they had to scrouge in there the best way they could get in * * * They humped and squatted down" throughout the entire course of the skip trip until "just before they reached the mouth coming out there was approximately seven or eight hundred feet, probably, they could raise up and get straight" (R. 2395). For similar description of skips at other mines of the Tennessee Company, see R. 1708, 1709, 2693, 2758, 2759. For a comparable description of the man trip at Republic's Raimund Mine, see R. 3026, 3028.

The many descriptions in the record [12] of injuries during the course of transportation bear witness to the fact that the descent into petitioners' mines is attended not only by the greatest discomfort and inconvenience, but also by considerable peril.

From the time they jump into the skips and descend the three to twelve thousand feet underground (R. 1262, 1308, 1565, 1663, 1838–1840; T. C. I. ex. 1, 2, and 3, R. 3587–3589; Sloss ex. 10, R. 3790; Sloss ex. 11, R. 3791; Republic ex. 1, R. 3974; Republic ex. 16, R. 4022)—in one mine 640 feet below the level of the sea (R. 3005)—the employees are in an environment entirely different from that which they have left on the surface. Immediately they became subject, as one of petitioners' witnesses stated, to the ever present dangers of falling slate (R. 1565). As summarized by the District Court, "The trips were, of course, in the comparative darkness and enclosure of an artificially lighted mine. The air was humid and malodorous, the ventilation relatively poor and the heat increasing with the descent into the mine" (R. 502, 563. See evidence R. 970, 1396, 1777–1778).

[12] *The Ore Miner*, December 1938, deft. ex. 5, R. 4454–4456; *ibid.*, February 1940, deft. ex. 6, R. 4461; broken or injured ribs (R. 1709, 3029); sprained ankles (R. 972, 1709); mashed arms, fingers, feet, and hands (R. 1709, 2490); bumped and "bloody" heads (R. 972–973, 2642–2643, 2789–2792, 3120, 4454–4456); fractured pubic bone (*The Ore Miner*, December 1938, deft. ex. 5, R. 4454), and fatal skip accidents (R. 1709, 1475).

Additional burdens, discomforts and perils attend the men after they are unloaded from the skips, when they continue their journey by foot (R. 504, 563). Vivid evidence was presented at the trial through the witnesses and photographs, of the journeys of the miners from the man-unloading station through the hundreds and in most cases thousands of feet to the heading. An issue of the Tennessee Company's publication "The Ore Miner" describes with illustrations the "unseen dangers" against which miners must be "constantly alert" (R. 4575–4579). The record amply portrays not only the stretches of relatively level ground in some of the mines, but also the man-ways and passageways which run up and down hill (R. 1197, 2404, 2697, 2813, 2961–2962) on grades of 5 to 40 degrees (R. 1119, 1382–1383, 2979, 2986, 2991), the rises in the ore to heights of 300 feet (R. 1383), paths filled with water (R. 2962, 3002, 3010, 3014), and strewn with muck (R. 3015, 3125–3126), "bumps" in the man-ways (R. 2696), holes from removed tracks (R. 2920), and dotted by water and air pipe lines, telephone wires (R. 2404), high voltage electric cables and trolley wires extending within reach of the men standing or carrying tools (R. 1920–1921, 1925, 2663, 2919–2920, 3013, 3039–3040; *The Ore Miner,* July 1939, deft. ex. 16, p. 8, R. 4575–4577). As many witnesses testified, most of the miners are required at one point or another in their trip from the man-unloading station to their working places to duck

through tunnels in the rock and bow to overhanging portions of the roof (R. 2697, 2932). In the Raimund mine of the Republic Company, the distance to be travelled by some of the miners after leaving the skip was considerably over two miles (R. 1918, 3035), and included the climbing of a steep hill in which recently 107 steps had been put (R. 1919, 3035). Before the steps were constructed the men had to climb the hill pulling themselves up with the assistance of a cable (R. 3062). This hill had to be climbed by about a hundred men on each shift (R. 1919).[13] As the miners near the working headings, the atmosphere is naturally increasingly heavy with ore dust and powder smoke. Where it has been necessary to do timbering in the passageway, there is frequently the pungent odor of creosoted timbers (R. 969, and due to the lack of facilities for sanitation, the mine air is befouled with the odors of human sewage from the man-unloading station to the slopes (R. 2408, 2821–2822).

This evidence abundantly supports the following findings of the District Court: "During these walks, the physical conditions encountered by the men were even more difficult than during the part of the descent spent in riding. The atmosphere becomes warmer and more humid, the ventilation

[13] See pictures, intervener's exhs. 38, 39 (R. 4544–4545, 3011–3012). For similar steps in another part of the haulage way of the same mine, see picture, intervener's exh. No. 43, R. 4549, 3015.

even less effective and the air fetid. The roof is low in places, requiring the walkers to stoop. The footing is irregular, sometimes rough, sometimes wet and slippery, overhead wires (often not insulated or guarded) and pipes must be carefully avoided. The passageways are up and down grades of varying steepness. In short, a very substantial amount of physical and mental energy is required during this walking" (R. 504).[14] Witness after witness likewise explained the regular practice of carrying tools and materials long distances from the tool house, the powder house, and oil drums, near the unloading station to their "working faces." One man out of each crew regularly picked up powder at the powder house en route to the working face (R. 1311–1312, 1421, 1424, 1440). The drill men regularly picked up oil in gallon cans en route to the "face" (R. 1273, 1314, 1424, 1490–1491, 2517, 2708, 2882–2883). In the mines where hangers, short steel, and C hooks were not picked up on the surface, it was customary to pick them up at the underground tool house near the man-loading station (R. 1212, 1271, 1309, 1315–1316, 2400, 2519, 2725, 2746, 2882). "The conditions are clearly

[14] Petitioners' attempt to minimize the hazards of the underground travel as existing "only when the workers became careless of their own safety" (Tennessee br. p. 35) is somewhat shaken by the testimony of one of their own witnesses who was injured in one of the ore mines of the Woodward Iron Company while making a safety inspection (R. 1564).

conditions peculiar to the occupation of the men in the class represented by the defendants, conditions replete with hazards, conditions requiring physical exertion and mental alertness, and conditions unpleasant and burdensome to those encountering them" (R. 502).[15]

[15] Petitioners' contention that conditions are substantially different in the different mines seems to reduce itself to a claim that at one of the 12 mines (Spaulding, operated by the Republic Company) the evidence did not show the same physical conditions, discomforts and hazards as were proved with regard to all of the other mines (see Tennessee Company br. pp. 35–36; Republic Company br. p. 38). This particular mine was explicitly excluded from the case by the original petition of the Republic Company (R. 179) and was not inserted into the case until late in the trial when counsel filed, and the District Court allowed, an amendment to the Republic Company's petition to include allegations with reference to this mine (R. 491–493). The amendment was filed on July 31, 1941, the day before the closing arguments were made. Out of the more than 5,000 pages of evidence, less than 10 pages relate to the Spaulding mine. That evidence, introduced over the objection of counsel for respondents, shows that the mine was operated only intermittently during the last 20 years (R. 1827), that the process used in the mine was still in the experimental stage and no merchantable ore had yet been produced there (R. 1828), and that the ore lies closer to the surface so that the men can walk to their working places without use of a skip to descend (R. 1910). The evidence with respect to this mine was taken on July 16, 1941, that is prior to the date of amendment injecting it into the case. It is plain that the evidence as to that mine has no significant bearing on the case. It certainly does not sustain petitioners' contention that the findings of fact by the District Court were contrary to the evidence in "substantial and determinative matters" (Tennessee Company br. p. 34–35).

B. EVIDENCE ON PETITIONERS' PRACTICES WITH RESPECT TO TRAVEL TIME[16]

Contrary to petitioners' assertion (pet. p. 45, Tennessee Company br. 43, Sloss br. 12), the evidence was not undisputed that there was in their mines a "traditional custom" (Republic br. 16) or "immemorial custom and agreements arrived at by the process of collective bargaining" (Tennessee br. 43) to exclude travel time in the computation of work time. Except for the unsupported statements of some of petitioners' witnesses, the evidence on this subject unmistakably substantiates the District Court's finding that there was "no such custom" and no such "free and uncoerced agreement" (R. 496, 497, 498). This finding is amply supported by substantial evidence, including the testimony of most of petitioners' own witnesses.

The record shows that during the greater part of the iron ore mining history in petitioners' mines, the miners in the production crews have been paid on a tonnage basis, without reference to time or hours of work. A so-called "contract basis" of pay was in effect in the mines of all three petitioners during substantial periods of their history. Under this system the "contractor" was credited with all the tonnage produced by mem-

[16] The question of the relevance of such evidence to the issue whether the travel time in fact constituted employment or work is discussed in the Argument, *infra*, pp. 58–61.

bers of his crew at a certain rate per ton. Each member of the crew in turn had a specified tonnage rate (R. 986–989, 1380, 1845). Altnough different tonnage rates were provided for different types of mine work, the amount of the miners' compensation was determined by the amount of ore which the crew loaded (R. 986, 988, 1380). When only one ton of ore was loaded the crew received comepnsation at their tonnage rates for only the one ton, and as production increased, compensation correspondingly increased (R. 2824–2826). The amount of time actually consumed by a crew in producing ore was immaterial (R. 986, 1379, 1513–1514, 2826, 3074, 3076). This system was in effect in the Tennessee Company's mines until 1914 (R. 844, 986). The Sloss Company mines used this system until September 1940 (R. 2824–2826, 1518). Although this Company in 1934 purported to go off the "contract basis" (R. 1380–1381), there seems to have been no difference in the "tonnage" basis thereafter adopted save that the "contractors" became known as "head miners" (R. 1380–1381, 1513, 2826). The Republic mines were still being paid on the "tonnage or contract basis" at the time of the trial (R. 1844–1845, 3072–3074).

Subsequent to 1914, the Tennessee Company put into effect some modifications of the contract system known as the "task" or "day pay" system

(R. 990).[17] The only apparent distinction between the "contract" system and the "task" or "day pay" system was that under the latter system a certain minimum tonnage or "task" is established by the company (R. 990, 1250, 1379–1380, 1517–1518), which is intended to serve as a quota or measure of the average day's work. The method of payment, however, remains on a tonnage basis and so long as a miner completes his task it is immaterial whether he remains at the face either half a day or a full day (R. 793, 1024, 1251, 1279). His earnings bear direct relations, not to his time, but to his production (R. 990, 1024, 1279). The tonnage rates under the "task" or "day pay" basis were supposedly adjusted to a ten-hour (later, in 1933, an eight-hour) day of productive work (R. 848, 868, 991, 1155). This meant that the tonnage rates were established on the basis of a rough estimate of the amount of ore which a good mine crew could produce in an average day of ten hours under average conditions during the time the contract system had been in vogue (R. 990–991, 1379). The frequent reference by petitioners' witnesses to the ten-hour or eight-hour day during the use of the

[17] The Sloss Company apparently adopted a similar "task" system in 1934 (R. 1379–1380, 1517–1518). Petitioners' witness, Harper, testified that "There is not much difference" between the tonnage basis and the task basis in the Sloss mines (R. 1379–1380); and the witness, Russell, remarked that "It would be rather complicated to explain" the difference (R. 1517).

"task" basis relates to this arbitrary conversion of tonnage rates into a daily rate. The so-called "incentive plan" which was adopted by the Tennessee Company in 1936 (R. 849, 1018–1022) was merely another modification of the "contract" system. It was practically the "task" system except that it provided extra compensation for ore loaded over the base or minimum tonnage (R. 848–849, 1790–1793).

During the period of the so-called ten-hour day in the Tennessee Company's mines, the miners' compensation purportedly began at 6:30 and ended at 4:30 (R. 1279). Although the men frequently entered the mines shortly after 6 o'clock, Mr. Scott, mine foreman at Wenonah No. 9, explained that during this period the men were not expected to be at their "working places" but were simply required to be "checked in" by 6:30 (R. 1279). Again, at the end of the shift, although pay did not "end" until 4:30, "shooting time" was regularly at 4:20 (R. 1198) at which time, if not before, all members of the production crews had left the face (R. 1198). Indeed, the evidence shows that as soon as they completed the "task" (i. e. loaded the minimum tonnage) the members of the loading crews would leave their "working places" (R. 1250–1251, 1279). Under the so-called ten-hour day, "Some loaded them [the number of cars set as the "task"] by 10:30 or 11:00 o'clock, and walked out. Some of them

would be 2 or 3 o'clock. Some of them loaded all day" (R. 1279). Under the eight-hour day, whether the miners spent six or nine "productive hours," they were credited with eight hours, and were paid, without regard to the time consumed, simply in relation to the amount of tonnage produced (R. 1024, 2826).

This rough approximation of "time worked" was continued by the Tennessee Company until May 1, 1941,[18] with the exception that in 1933 the "base" number of hours was purportedly reduced from ten to eight (R. 991). Yet the men who formerly reported to the tally house around 6 o'clock continued to report at approximately the same time (R. 1155, 1198), while the "shooting time" when the men left the face was moved up, not two hours, but only an hour or an hour and ten minutes—from 4:10 or 4:20 to 3:10 (R. 1167, 1198). The artificiality of the so-called "eight-hour day" at the "working face" is emphasized by the fact that although the time of the miners "ended" at 3:15 (R. 791), Mr. Ball of the Tennessee Company testified that the first skip load of men "on an average for the eight mines" always left the underground man-loading station before 3:15 (R. 790). In fact, the evidence shows that the miners frequently left their "working places"

[18] Petitioners adopted the "portal to portal" basis of pay after May 1, 1941 (R. 276, 2369).

well before 3:15 and were at the hoodlum[19] or on their journey through the man-ways before their time had officially "ended" (R. 789). Nevertheless, whether the crew was at the working face six, seven and one-half hours, or eight and one-quarter hours, the head miners would credit their men with an eight-hour day (R. 793, 1024).[20] Thus the District Court correctly concluded that regardless of the terminology of the methods of pay and "regardless of the phraseology of the contracts, the pay was on a shift basis, rather than an hourly basis, and since some of the men did not spend a full eight hours at their particular stations, it cannot be categorically stated that they received no compensation for at least part of the time spent by them in traveling to and from their usual stations" (R. 497).

Petitioners' methods of paying the service crews likewise demonstrate the artificiality of their claim of an "immemorial custom" to exclude all travel

[19] The underground man-loading station was frequently referred to as the "hoodlum" (R. 981, 1247, 2696, 3088).

[20] The testimony of Mr. Ball of the Tennessee Company is illuminating (R. 1024):

"Q. Now, I don't understand that quite, Mr. Ball. You say it always shows eight hours. Would that mean if he stayed there six hours it would still show eight hours, or if he stayed there 9 it would still show eight hours?

"A. Yes. They didn't keep any accurate time at the working face, and as the rates of pay and the day's work was computed on an eight-hour basis, he put down eight hours."

time from the computation of working hours. The service crews, which do the timbering, the laying of tracks and pipes, the building of chutes, etc., "operate all over the mine" (R. 767). They could not, therefore, be paid on the so-called "face to face" basis, and since they produced no tonnage, they could not be paid on a tonnage basis. Prior to 1914 they were on a so-called "turn" or "shift" basis of ten hours (R. 987). In those days up to 1914, the mines were very shallow (R. 986) and the service men were paid as they entered the mine, that is, their time would start at the check-in or tally house at the mine portal (R. 987). During this period there was no custom dealing with pay for travel time, because no such time, or substantially none, was involved. Subsequently, as the mine workings reached a greater distance underground, the tool house near the place where the men left the skip was assigned as the "working place" of the service crew (R. 798, 932), although actually they might not start to lay track, or to timber, or to perform other services until they had walked considerable distance to a particular "face" where the service was needed (R. 981–983, 1274, 3096–3097). If a service man was switched to a drill crew underground, as has happened "very, very frequently" (R. 983), the time consumed in walking from the tool house to the "face" was regarded as part of his "shift" or working time (R. 983–985). Under the eight-

hour day the service men, like the production men, were credited with eight hours regardless of the time actually spent by them at their assigned "working places." A service foreman in one of the Tennessee Company mines testified "We didn't pay any attention to time, after we got there [at the tool house]" (R. 3111). Although their shift supposedly did not start until 6:45 a. m., the service crews sometimes started out on a service job at 6:15 a. m. (R. 3114–3115). Although "paid" until 3:15, the service men regularly left the tool house, which supposedly was considered their "working place" (R. 798), at any time from approximately 2:30 (R. 1199). Thus from petitioners' own testimony it is apparent that the "eight-hour day," like its predecessor ten-hour day, was simply a bookkeeping operation or method of calculation in no way reflecting the actual working time of the employees involved. Insofar as the service men are concerned, it is clear that most of the time spent walking underground was regarded as time worked; the only question as to them is as to the relatively short time traveling on the skip from the surface to the tool house.

The evidence relating to petitioners' negotiations and agreements with employees likewise negates the existence of any established custom with respect to travel time. The impression petitioners seek to create of a long history of collec-

tive bargaining on the subject is not borne out by the evidence. On the contrary, collective bargaining has been a practice of most recent origin in petitioners' mines and appears to have been only reluctantly indulged even under the pressure of statutory mandate.

A superficial reading of the portions of petitioners' briefs relating to the history of negotiations and agreements with the International Union of Mine, Mill and Smelter Workers, may give the impression of genuine collective bargaining for a substantial period of time prior to the enactment of the Act. However, an analysis of the facts will reveal that most of the so-called "negotiations and agreements" consisted of the rejected proposals and requests of the Union, with the rejections usually accompanied by explicit statements that petitioners would not deal with the Union, and in many instances by reprisals and discrimination against employees who were members of the Union. The fact is that prior to the enactment of the Fair Labor Standards Act not one of the petitioners had entered into a contract with the Union. The Tennessee Company entered into its first contract with the Union on October 6, 1938 (R. 901-902, 105), about three months after the enactment of the Act; the Sloss Company entered into its first Union contract on September 9, 1939 (R. 3804, 3810), more than a year after the enactment of the Act; and the Republic Company up

to the date of the trial had never made a contract with the Union (R. 1899).

Although the Tennessee Company would on occasion meet and talk with Union representatives, it refused consistently to recognize the Union as a collective bargaining representative, up to the eve of the enactment of the National Labor Relations Act (R. 3591, 3599, 3626). On October 1933, when a committee of the Smelters' Union called on the president of the company to present some requests regarding some of the employees, the company left no doubt of its position, advising the Union representatives that "we are aware of the existence of these various groups [unions], in which may be found some of the employees of this company; in the same spirit we are aware of the existence of church groups of various denominations, of fraternal orders of different kinds, and of other societies formed for a variety of purposes" (R. 3591), but that other procedures had been provided for the presentation of complaints and suggestions from employees (R. 3593). In April 1934, when Union representatives again endeavored to obtain recognition of the Union, they were met with the following rebuff: "If it is intended that you are advising us of the existence of your Union or any Union, we answer that we are aware of the existence of many Unions, among them being yours. If by this it is intended that we agree to deal with your Union,

or any Union, as such, we must answer that we will not do so" (R. 3599).

Meanwhile the company had been engaging in various practices to break the Union organization through fostering a company dominated Union (R. 993–995). During the strike in the spring of 1934, company officials conferred with union representatives, but no settlement was reached (R. 871). The strike was settled not by a contract with the Union, but by "letter of understanding" addressed by the company to a representative of the Department of Labor (R. 875, T. C. I. ex. No. 8, R. 3604). Subsequently the company continued its policy of refusing to bargain collectively with an independent union, and fostering a company union (R. 993–995, 3693–3703).[21] On June 24, 1935, less than a month prior to the enactment of the National Labor Relations Act, the company reiterated its unwillingness to enter into a contract with the independent union (R. 3625–3626). After the 1936 strike,[22] over 150 employees who

[21] Petitioners assert that the Union was strong enough in 1934 to close the mines, implying that it had great bargaining power (Tennessee Co. br. p. 38). The extent of the Union's bargaining power is more accurately indicated by two significant facts (1) the mines reopened after the "letter of understanding" only to be closed down again by petitioners within a few days (R. 1008) because that was "during an acute time of the depression" when a "great many furnaces were down" (R. 1065), and (2) petitioners had a stockpile of over 700,000 tons of ore at that time (R. 872).

[22] During the 1936 strike the Tennessee Company officials conferred with the Union representatives, but the

were members of the International Union of Mine, Mill and Smelter Workers, were discharged as "undesirables" (R. 2409–2416, 2479, 2667–2668), with the result that the average attendance at Union meetings dropped from 300 to 400, to about 25 (R. 2413, 2667). In May 1937, when the company was refusing to sign a contract with the independent union, it signed a contract with the company dominated union (T. C. I. ex. No. 18, R. 3720). Not until a year and a half later, after a complaint had been filed with the National Labor Relations Board charging that approximately 172 members of the Smelters' Union had been improperly and discriminatorily discharged (R. 2295), did this company sign its first contract with the independent union. The contract was signed as part of the settlement of the charges filed with the National Labor Relations Board (R. 2295); in other provisions of the settlement the company agreed to reinstate 138 of the complainants and to pay approximately $102,650 in settlement of claims for reimbursement (*ibid*).

The Union fared no better with the Republic Company. According to charges filed by the Union in December 1933 with the National Labor Board (under the National Industrial Recovery

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tenor of the conference is reflected in the repeated statements of Mr. Ball, that "that is not true" (R. 3658), it "will not be changed" (R. 3659), or "the only answer to this is no" (R. 3672, 3673, 3674, 3676, 3685, 3686).

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Act), the company, a few months after the organization of the Smelters' Union, proceeded to promote a company union and "to antagonize, intimidate, discharge, and otherwise punish and oppress the Union members" (R. 4581, 4582). The 1934 strike was resolved by a letter of understanding (R. 1879, Republic ex. No. 5, R. 3983), addressed to the Department of Labor representative, comparable to the letter sent by the Tennessee Company. This company also continued to foster a company union, even after the enactment of the National Labor Relations Act (R. 906–907), and according to charges filed by the Smelters' Union in 1939 (R. 1895, Republic ex. No. 11, R. 4004), discharged and discriminated against employees who were members of the independent union. These charges were settled by a stipulation in which the company consented to an order for the reinstatement of employees and reimbursement of claimed back pay in the amount of $3,150.00 (Republic ex. No. 13, R. 4009). As noted above, the Republic Company, up to the date of trial, had never made a contract with the Smelters' Union.

The Sloss Company in 1936 (R. 3774, 3777) negotiated and signed contracts with employees who represented the Smelters' Union, but insisted upon treating with them as employees' representatives (R. 2945, 3774, 3777, 3796), and not as representatives of the Union. The first agree-

ment signed with the Union, as such, was the one referred to above on September 9, 1939.

Upon this record it is plain that there was no true collective bargaining between petitioners and their employees prior to the enactment of the Fair Labor Standards Act. Petitioners' suggestion that the "face to face" basis of payment was established by a long history of collective bargaining agreements prior to the passage of the Act is not correct. From the earliest date that an independent union spoke on behalf of the petitioners' employees (in 1933 when the Smelters' Union was organized),[23] it protested the injustice of requiring the men to travel underground on their own time and made repeated efforts to secure recognition of travel time as working time (R. 3240–3241, 3975–3976, deft. Ex. No. 9, R. 4581 at 4586,

[23] In a list of proposals submitted to the Republic Company in September 1933, shortly after the Smelters' Union was organized, it was proposed that "(6) the men enter the mine on their own time and come out of the mine on the company time" (Republic ex. No. 2, R. 3975–3976). In December 1933, in the complaint filed by the Smelters' Union with the Labor Board (under N. R. A.), it was requested "that the men be not required to enter and leave their place of work on their own time" (deft. ex. No. 9, R. 4581 at 4586). The latter request, in the same language, was made again in March 1934 (R. 3978 at 3980). Similar written requests were made of the Tennessee Company in October 1933 (R. 3591–3592), and in April 1934 (R. 3594–3595). A similar written request was made of the Sloss Company in April 1934 (R. 1620, 3751–3752); previously oral requests of the same nature had been made of the Sloss Company (R. 2830–2835; 2937–2938).

2719). Petitioners' statement that this demand "was not seriously made" (Tennessee br. p. 6) can only mean that the employees could have had no hope that the operators would give it reasonable consideration. It was one of the requests in the Union's proposed contract the rejection of which resulted in the 1934 strike (R. 2939, 3751); and was renewed in practically every attempt to negotiate a contract (R. 1878–1879, 2711–2718, 3238–3241, 3975–3976, 4581 at 4586).

The suggestion that the Union volunteered the "usual working place" provision by including it in some of its written demands and proposed contracts (see Sloss br. p. 6) overlooks the evidence showing that such written proposals were made only after previous proposals for a "portal to portal" basis for one way travel on company time, had been rejected (R. 2830–35, 2718–19, 3238–39, and references in footnote 23, *supra*). At the time the Fair Labor Standards Act was enacted all of the requests regarding travel time like all the proposals to bargain with the Union, had been uniformly refused. It is clear on this record that the "face to face" method of computing the workday had been arrived at, not by collective bargaining, but by unilateral employer decision. Moreover, although the contracts signed by the Tennessee and Sloss Companies with the Unions provided that the "eight-hour day means eight hours' work at the usual working places"

(R. 107); this provision, as pointed out above, was carried out on a rough shift basis, rather than on an hourly basis (see pp. 22–23, *supra*).

C. THE ADMINISTRATOR'S INTERPRETATIONS

After the enactment of the Act, the Administrator in July 1939 issued Interpretative Bulletin No. 13 (R. 412), outlining what he considered the basic principles to be applied in determining "hours worked." The Bulletin was prepared for general use and, as was usual with his printed bulletins, was in general terms. While it contained several paragraphs (pars. 4, 5, 6, 9–15) on the question of travel time, waiting time, and the like, it said nothing on the particular question of underground travel in mines. In 1940, in response to numerous requests that he express his opinion as to the application of these general principles to situations typical of underground metal mining, he initiated an investigation of the situation in such mines (R. 80). On the basis of the written report of his representative who conducted the investigation (R. 76–102), the Administrator on March 23, 1941, announced that he was approving the report and adopting for enforcement purposes of the Act in the underground metal mining industry the "modified portal to portal" principles contained in the report (R. 78). Briefly, the conclusion was that the workday starts when the miner reports for duty as required at or near the

collar or portal of the mine and ends when he reaches the portal at the end of the shift, including the aggregate of the time spent on the surface in obtaining supplies and in checking in and out, but excluding any fixed lunch period of one-half hour or more.[24]

The report also explained the circumstances in the bituminous coal mining industry which had lead the Administrator to adopt a different enforcement policy for that industry (R. 94–96). It was pointed out that the coal policy had been adopted for practical enforcement purposes primarily because the practices in that particular industry were supported "by a long history of bona fide collective bargaining agreements" (R. 94) and "collective bargaining not for particular mines or localities, but on a nationwide basis" so that the practices adopted in that industry were "virtually universal" (R. 96).[25] There was thus no prac-

[24] The principles are summarized at the end of the report (R. 102).

[25] See also plaintiff's exhibit 6 for identification (R. 4729–4730). Other practical considerations which the Administrator stated had influenced his bituminous coal enforcement policy were: the Union representatives as well as the operators at that time were urging him to refrain from seeking to disturb a practice incorporated in their collective bargaining agreements over a long period of years; they asserted that the provisions of those agreements, negotiated over a long period of time and pursuant to bona fide collective bargaining, were so integrated and interdependent that complete renegotiation of the Union contract would be necessitated by a different standard for

tical problem in the bituminous coal industry of varying local practices or customs. The report pointed out, as the record in the instant case confirms, that the situation in metal mining was not at all comparable with respect either to collective bargaining or to uniformity of practices or customs (R. 96), and concluded that the Administrator's policy with respect to coal, assuming it to be correct, was inapplicable to metal mining because "the conditions on which the bituminous coal opinion was based are not to be found in metal mining" (R. 96).

The District Court excluded as irrelevant the Administrator's action and other evidence with respect to bituminous coal mining (R. 2047, 2102). We deem it appropriate however to summarize recent developments in the coal situation since petitioners in their briefs have given a partial account of them. Changes in the facts in that industry in recent months have made the Administrator's original coal enforcement ruling no longer applicable. When the bituminous coal collective bargaining contracts were about to expire

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measuring time (pl. ex. for identification no. 25, R. 4710–4716, printed in the Tennessee Company's brief at p. 67). Moreover, the bituminous coal mines were then operating on a seven-hour day, 35-hour week, at the "face" (*id.* 4713), so that there was several hours' tolerance before the overtime provisions of the Act could come into operation; if travel time amounted to no more than one hour per day, the overtime provisions would not have become operative at all, even if the "portal to portal" standard were applied.

on March 31, 1943, the miners demanded wage payment on a "portal-to-portal" basis, because of the decisions of the courts below in this case. Since the expiration of those contracts there has been no agreement arrived at by "collective bargaining in the complete sense" (R. 4712) to compute compensation on a "face-to-face" basis. It was in large part, upon the "long history of *bona fide* collective agreements" to this effect that the Administrator relied in his July 27, 1940, release which announced his enforcement policy in bituminous coal mines (R. 4716–4717). To the contrary, there has been subsequently wide disagreement, which has been resolved by contracts, signed by operators producing two-thirds of the nation's coal supply,[26] on the basis that wage payments are to be computed from portal to portal.[27] The difficulty in reaching an agreement and in obtaining the approval of the War Labor

[26] Press Release C. M. A. 38, December 18, 1943, Department of Interior, Coal Mines Administration (copy filed with the Clerk). The Secretary of the Interior stated that operators producing approximately 390,000,000 tons of soft coal annually had signed a contract with the United Mine Workers on December 17, 1943. In 1942 the national production of soft coal was approximately 580,000,000 tons. Bituminous Coal and Lignite, Chap. (preprint) from Minerals Year Book 1942, U. S. Dept. of Interior, Bureau of Mines, pp. 1, 5.

[27] The basis for the agreement referred to in note 26, *supra*, was reached on December 11, 1943. The contract was signed by the operators and the miners' union on December 17, 1943, and submitted to the War Labor Board for approval. Press release C. M. A. 38, *op. cit.* note 26. Paragraph 2 of the

Board over the last several months has been due to doubts as to whether proposed contract provisions contained genuine compensation for travel time and whether the proposed wage rates were permissible within the administration's wage stabilization policy.[28] Thus, the present practice

agreement provides: "For all inside employees, work time shall begin at the portal and end at the portal * * *". A press release of the Secretary of the Interior dated December 11, 1943, has a copy of the agreement attached (copy filed with the Clerk).

[28] The several principal orders and opinions of the National War Labor Board since April 1943 dealing with the bituminous coal labor controversy and the various proposed wage contracts are:

In the Matter of *Operators' Negotiating Committee Appalachian Joint Conference and The Southern Appalachian Joint Wage Conference and The United Mine Workers of America*, Case No. 111–1284:

Order, April 24, 1943 (OWI Release No. B–609).

Interim Directive Order, May 14, 1943 (OWI Release No. B–653).

Comments and Directive Order, May 25, 1943 (OWI Release No. B–669).

Directive Order June 18, 1943 (OWI Release No. B–736).

In the Matter of *Illinois Coal Operators Association and United Mine Workers of America, et al.*, Case No. 13–279:

Order and Opinion, August 24, 1943 (OWI Release B–938).

Decision, October 26, 1943 (OWI Release No. B–1067).

In the Matter of *Memorandum of Agreement Between The Secretary of The Interior and The United Mine Workers of America*:

Resolution of the National War Labor Board, November 5, 1943 (OWI Release B–1096).

Letter from William H. Davis, Chairman of the Na-

in most of the bituminous coal industry, and the provisions incorporated in the new *"bona fide"* collective bargaining agreements,"[29] compensate miners for travel time underground.[30]

Whatever may be said of the Administrator's previous enforcement policy with respect to travel

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tional War Labor Board to the Secretary of the Interior, November 20, 1943 (OWI Release No. B–1127).

Copies of these documents have been filed with the Clerk.

[29] These agreements await the approval of the War Labor Board and action by the Office of Price Administration before becoming effective. The miners are now working under the terms and conditions of the Memorandum of Agreement Between the Secretary of the Interior and the United Mine Workers of America of November 3, 1943, which provides for compensation on a "portal to portal" basis. The agreement was approved by the War Labor Board on November 5, 1943, and November 20, 1943, pursuant to Section 5 of the War Labor Disputes Act (Act of June 25, 1943, c. 144, Pub. No. 89, 78th Cong., 1st sess.). See Office of War Information Releases B–1096 and B–1127; *op. cit.* note 28 *supra*.

[30] In indicating its policy as to the designation of an estimated average of travel time for all the mines during the period of Government operation, the Board said: "We are willing to do this even though the present travel time may somewhat exceed this amount because we are convinced that when travel time is paid for, the economic inducement imposed on the operators will lead them to reduce the travel time, and because the mine workers have, in their submission of the proposed Illinois Agreement, expressed their willingness to have the operators reduce the travel time as much as they can if adequate facilities are provided in connection with any newly opened portals." [*In re Illinois Coal Operators Assn.*, October 26, 1943, Case No. 13–279]. See also letter from the Chairman of the War Labor Board to Secretary Ickes, November 5, 1943, approving the agreement made, *op. cit.* note 28, *supra*.

time in coal mines, the plain fact is that his consistent ruling with respect to metal mines has been that in them travel time is work time.

D. DECISIONS OF THE COURTS BELOW

The District Court ruled (1) that the time in controversy (including time spent at the surface obtaining and returning lamps and tools and checking in and out) constitutes work time (R. 565), since the activities and the travel are under the control of the employers "in the interest of efficient operation of their mining business," and since "such time is a necessary and incidental part of the actual production of ore" (R. 503), (2) that there was no custom in petitioners' mines excluding such time from the workweek (R. 496, 557–560), that during a great part of their history petitioners had paid their miners on a tonnage basis and at other times on a task basis "without regard to hours worked at any point" (R. 496), that even under the eight hour day provision, the miners had been paid on a shift or tonnage basis "rather than an hourly basis" (R. 497), and that petitioners' methods of payment of wages "were not arrived at by unhampered consent of the workers" or "with their free uncoerced agreement" (R. 498), but "were dictated almost entirely by the employers" (*ibid.*), and (3) that in any event an occupational custom or usage, or an agreement between the parties, cannot operate to avoid the re-

quirements of the Act (R. 499). With respect to the alleged custom, the court observed (R. 499) that "it would be a mockery of the beneficent purposes of the Act if the provisions prohibiting employment for over a specified number of hours for each workweek, except at an increased rate of compensation, were held to incorporate a custom to pay employees only for a part of the time worked by them."

The Circuit Court of Appeals (R. 4938–4942) affirmed, but modified that part of the District Court's decision which held that the time spent by employees checking in and out, and procuring and returning tools, lamps, and carbide at the surface of the mine was also working time (R. 4942).[31]

[31] The Government believes that the Court of Appeals was in error in ruling that this time was not part of the working time. Since the amount of time thus consumed in this case is not large, it was not deemed of sufficient importance to warrant a cross petition for certiorari. The District Court made the following finding, supported by the evidence reviewed, *supra*, pp. 5–7, with respect to this time: "No serious conflict of evidence is apparent as to the liability of the plaintiffs for payment to their underground ore mining employees for the aggregate of time spent on the surface in obtaining and returning lamps, carbide and tools and in checking in and out. * * * Certainly the infrequency of activities or the speed with which they can be performed will not change their essential nature as work, and it seems an inescapable conclusion that the activities mentioned are obviously work. They are performed on the premises of the employer, in the furtherance of the employer's business, with no benefit to the employee

SUMMARY OF ARGUMENT

I

Petitioners' underground miners, during the travel time in question here, are "employed" and are engaged in a "process or occupation" necessary to the production of ore within the plain language of Sections 3 (g), 3 (j) and 7 (a) of the Act. The evidence showing how the travel time is spent, what the miners have to do, the discipline and control to which they are subject, and the discomforts and hazards of the trip, can leave no doubt that the miners are not only "employed" and engaged in a "process or occupation necessary to * * * production" during their underground travel, but that they are also engaged in hard work, within the ordinary understanding of those terms. Nothing in the statute or in reason suggests that compensation should be paid only for "productive" work in the sense in which petitioners use the term. The underground travel is as necessary to production and the operation of the mines and as much subject to the employer's control and supervision as is the actual drilling for ore at the face. In addition it has all of the

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(except to aid him in the performance of work for the employer), under conditions created and controlled by the employer, and they involve responsibility to the employer and physical exertion, even though not burdensome, on the part of the employee. No characteristic of work is lacking. This time must be included in the workweek of the employees represented by the defendants" (R. 500–501).

characteristics of hard dangerous work. If an employee can be "none the less on duty when inactive" (cf. *Missouri, K. & T. Ry. Co.* v. *United States,* 231 U. S. 112, 119), *a fortiori* the miners are on duty or employed during their underground travel, pursuant to the occupation for which they are employed.

The logic of the "portal to portal" principle is sustained by the decisions interpreting the Fair Labor Standards Act as well as by the decisions interpreting analogous statutes. Its reasonableness and practicability are attested by the fact that it has been applied for many years in two of the great mining States in this country as well as in a number of foreign countries.

II

Petitioners' reliance upon "traditional practices" and "collective bargaining" agreements is founded upon the fallacious assumption that the absence from the Act of a specific provision on underground travel in mines evidences a congressional intent to perpetuate established customs and agreements. No such significance can be attached to the absence of particularity in a statute of such general application, designed to provide the standard for a wide variety of industries. The intent of Congress, though necessarily expressed in general terms is clear, as shown in Point I, that compensation should be required for all employ-

ment. This requirement cannot be avoided by any custom or agreement. In any event, if custom and agreement are entitled to weight in determining what is employment or working time, the pertinent practices would be those in petitioners own mines in Alabama, and not the customs, practices and collective bargaining history in other industries. This case does not involve the bituminous coal mines. The trial court did not, and as a practical matter, could not have inquired into and determined the conditions and customs in the coal mines.

In petitioners' mines there has been no established custom or long history of agreement to pay only and solely for time actually spent at the "face." The evidence amply supports the District Court's finding to this effect. Various methods of payment have been in use in petitioners' mines, primarily the tonnage and task bases, without regard to hours worked at particular points. Nor had the "face to face" practice been established in petitioners' mines by bona fide collective bargaining agreements. On the contrary, not until after the passage of the Act was there collective bargaining in petitioners' mines; the methods of payment have been dictated almost entirely by the employers, frequently over the futile protests of the employees' representatives. Not one of petitioners had entered into a contract with an independent union prior

to the enactment of the Fair Labor Standards Act. Under such circumstances to speak of the "face to face" practice as an "immemorial custom" in petitioners' mines (Tennessee br. p. 49) and a practice arrived at through a long history of collective bargaining agreements between petitioners and their employees "represented by strong national unions" (*id.* pp. 18, 49) is both artificial and wholly incorrect. The customs and collective bargaining agreements in mines other than petitioners', and particularly in the bituminous coal mines, do not constitute proof of the practices in petitioners' mines or of the collective bargaining agreements between petitioners and their employees.

The Administrator's enforcement policy with respect to the bituminous coal mining industry, announced in a press release, is not relevant. Whether right or wrong, it was based upon considerations not present in metal mining. Moreover, the release in question was only an informal declaration made by the Administrator for enforcement purposes with respect to a particular practical problem. It did not purport to be a legal interpretation. Assuming that this declaration is inconsistent with the Administrator's metal mining ruling, the latter is applicable here and is the correct legal interpretation pertinent to this case. If the declaration of his coal enforcement policy be regarded as a legal interpretation, we think it

was wrong to the extent that it may be inconsistent with the decisions of the courts below.

ARGUMENT

I

THE MINERS ARE EMPLOYED OR AT WORK, WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT, DURING THE TIME SPENT TRAVELING UNDERGROUND

The District Court found that the travel time was "under the strict control" and "the complete supervision" of the petitioners (R. 502–503), that "it exacted mental and physical exertion" (R. 504, 566) and was "pursued solely as a necessary incident to the prosecution of the employer's business" (R. 500, 4941). These findings are supported by virtually undisputed evidence and suffice to bring the travel time squarely within the terms of the statute. The statute provides that no one, who is engaged in commerce or in the production of goods for commerce, shall be employed for a workweek longer than the prescribed hours unless the employee receives compensation for excess hours at a rate not less than one and one-half times the regular rate (Section 7 (a)). Under the statutory definition the word "employ" "includes to suffer or permit to work" (Section 3 (g)), and "production" includes "any process or occupation necessary to * * * production" (Section 3 (j)). The Circuit Court of Appeals pointed out (R. 5002), "The [statutory] language is plain;

it requires no outside aid in its interpretation; it contains simple words that are in common use; and, under fundamental rules of construction, such words must be given their usual and ordinary meaning."

Accordingly, in determining what constitutes employment or work within the meaning of the Act, the significant inquiry is not whether the employee is engaged in so-called "productive" labor but rather whether the employee is subject to the employer's direction and control and is engaged in services contributing or necessary to the performance of the job for which he was hired. That the employer obtains more profit from the precise occupation of drilling or loading ore is of course irrelevant. There is nothing in the statute, or in the legislative history, suggesting that compensation should be paid only for the most "productive" work. The statute broadly requires that the employee be compensated for his *employment* in the production of goods for commerce and that includes "any process or occupation necessary" to such production (Sections 7 (a), 3 (g), 3 (j)) [Italics supplied].

The evidence in the record describing the underground descent and ascent in petitioners' mines establishes with forceful eloquence that this "travel" not only possesses all of the elements of employment but also all of the characteristics of hard work. Assuming, as petitioners claim, that

the miners' pay, prior to the Act, did not "start" until the electric current went on in the mines, or at some other arbitrary moment, or that the "time ended" after the "shooting" at the end of the shift, this did not reduce the exertion, the burden and the peril of the time spent from the portal to the face, nor relax to any degree the employees' subjection to the employers' control, nor make the travel any the less a "process or occupation necessary" to the production of ore. The so-called "productive" work, obviously only a part of the work of mining, could not begin until the miners reached the headings or stopes, which are accessible only by the skips or man-trips on the main slopes, and the man-ways or haulage-ways over which the men must work their way. Nor could the actual drilling be carried on unless the miners carry down their carbide and lamps, and see to it that they have an adequate supply of oil for their drills, and other tools, and materials at the working faces. These activities are no less essential to production than are timbering, ventilating, track laying, and the other jobs of the service crews, or quarrying the roof and other "unproductive" labor performed by the miners themselves.

With a few minor exceptions, the courts have consistently interpreted the Fair Labor Standards Act as including within its scope time spent in "unproductive" activities which are a part

of the employee's job or duties. The duties of night watchmen, for example, have been held to constitute production for commerce within the coverage of the Act, although they involve no "productive" activities and are usually performed during hours when the plants are closed, and no production in the strict sense is in progress. *Walton* v. *Southern Package Corp.*, No. 159, present Term, decided January 3, 1944. *Johnson* v. *Phillips-Buttorff Mfg. Co.*, 178 Tenn. 559, 160 S. W. (2d) 893 (1942), certiorari denied, 317 U. S. 648; *Walling* v. *Sondock*, 43 F. Supp. 339 (S. D. Tex.), reversed, 132 F. (2d) 77 (C. C. A. 5), certiorari denied, 318 U. S. 772; *Milam* v. *Texas Spring & Wheel Co.*, 157 S. W. (2d) 653 (Tex. Civ. App. 1941); *Lefevers* v. *General Export Iron and Metal Co.*, 36 F. Supp. 838 (S. D. Tex.). See also *Kirschbaum Co.* v. *Walling*, 316 U. S. 517.[32]

[32] For numerous other cases holding the requirements of the Act applicable to night watchmen who were presumably on duty when no production was going on see *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. (2d) 655 (C. C. A. 10) (watchman for pipe lines and oil refinery, presumably both night and day); *Shepler* v. *Crucible Fuel Co.*, 6 Wage Hour Rept. 185 (W. D. Pa. 1943), affirmed on other grounds, 6 Wage Hour Rept. 936 (C. C. A. 3, 1943); *Niehaus* v. *Joseph Greenspon's Son Pipe Corp.*, 164 S. W. (2d) 180 (Mo. App. 1942); *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40 (W. D. Tenn.); *Reliance Storage & Inspection Co.* v. *Hubbard*, 50 F. Supp. 1012 (W. D. Va.); *Dollar* v. *Caddo Lumber Co.*, 43 F. Supp. 822 (W. D. Ark.); *Reeves* v. *Howard County Refining Co.*, 33 F.

Other non-productive activties, such as waiting for work, or standing by on call, or getting machines and engines ready for production, which are necessary or incident to the employment, also have consistently been recognized as constituting work time within the meaning of the Act. *Fleming* v. *North Georgia Mfg. Co.*, 33 F. Supp. 1005 (N. D. Ga.);[33] *Reck* v. *Zarnocay*, 33 N. Y. S. (2d) 582 (Sup. Ct. N. Y. Co. 1941); *Walling* v. *Sun Publishing Co.*, 47 F. Supp. 180, 191 (W. D. Tenn.); *Travis* v. *Ray*, 41 F. Supp. 6 (W. D. Ky.); *Walling* v. *Blue Mt. Logging Co.*, No. 380, W. D. Wash., decided October 13, 1942; See also *Davies* v. *City of Seattle*, 67 Wash. 532, 121 P. 987 (1912).

Under the same principles, underground travel has consistently been recognized as working time within the meaning of the Act in the few cases in which the question has arisen. In addition to the decisions of the courts below, the District Court

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Supp. 90 (N. D. Tex.); *Cushway* v. *Stork Engineering Co.*, 51 F. Supp. 568 (E. D. Mich.); *Acme Lumber Co.* v. *Shaw*, 243 Ala. 421, 10 So. (2d) 285 (1942).

[33] In this case Judge Underwood, rejecting the contention of defendant that employees were not at work during much of the time they were on the company's premises because there were substantial periods when they were idle, waiting for work, stated (p. 1006): "* * * their claims that employees, though remaining in the factory long hours, were really not employed a great part of the time and were free to utilize such time as they saw fit, are puerile and too transparent to deceive anyone."

of Idaho, in the case of *Sunshine Mining Co.* v. *Carver*, 41 F. Supp. 60, held that underground travel in gold, silver, copper, lead, and other metal mines, constituted working time compensable under the Act. See also *Butte Miners' Union No. 1* v. *Anaconda Copper Min. Co.*, 112 Mont. 418, 118 P. (2d) 148 (1941), construing the Montana Eight Hour Law to include the "portal-to-portal" principle.[34]

The logic of these decisions is sustained by decisions interpreting analogous statutes. Particularly pertinent are the decisions under the Federal

[34] *Ex Parte Martin*, 157 Calif. 39, 106 P. 235 (1909), a 35-year-old decision of the Supreme Court of California, upon which petitioners rely (Tennessee Company br. pp. 15–16), is the single decision holding that underground travel is not part of the workday. The California court placed principal reliance upon the case of *United States* v. *Post*, 148 U. S. 124, which it apparently misinterpreted. To the extent that the *Post* decision is pertinent, it seems to be contrary to the result reached by the California court.

As to petitioners' assertion that "research has not disclosed any construction contrary to the Supreme Court of California with the exception of *Butte Miners' Union*" decision, *supra*, (Tennessee br. p. 16) it should be observed that no decisions have been found which follow the California court's construction. It does not follow from the fact that other States have enacted substantially similar statutes that they have "presumably adopted the construction of the Supreme Court of California" (Tennessee Company br. p. 16). As a matter of fact, the only other pertinent judicial construction of such a statute which we have found (and petitioners cite no other), is the *Butte Miners' Union* decision, which adopted a construction contrary to that expressed by the California court in *Ex Parte Martin*.

Hours of Service Act,[35] limiting the consecutive hours of service of railroad employees. In *Missouri, K. & T. Ry. Co.* v. *United States*, 231 U. S. 112, this Court held that time spent "waiting, doing nothing" while the engine was sent off for water and repairs, should be included in determining whether the employees had been on continuous duty in violation of the provisions of the Hours of Service Act. Mr. Justice Holmes, speaking for the Court, pointed out that the employees "were under orders, liable to be called upon at any moment, and not at liberty to go away." He held that they were "none the less on duty when inactive. Their duty was to stand and wait" (231 U. S., at 119).[36] This same rea-

[35] C. 2939, 34 Stat. 1415, 45 U. S. C., sec. 61. Section 2 provides in part: "It shall be unlawful for any common carrier * * * to require or permit any employee * * * to be or remain on duty for a longer period than sixteen consecutive hours * * * *Provided*, That no operator, train dispatcher, or other employee * * * shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period * * *."

The term "on duty" is essentially the same as "employment" or "work." The term "work" has been defined to include "employment," "task," "duty." See Webster's International Dictionary (2nd Ed.) p. 2950; *State* v. *Rose*, 125 La. 462, 466, 51 So. 496, 497 (1910); *Chicago & A. R. R. Co.* v. *Bragonier*, 119 Ill. 51, 63, 7 N. E. 688, 693 (1886).

[36] To the same effect see *United States* v. *Southern Pac. Co.*, 245 Fed. 722 (C. C. A. 9); *Minneapolis & St. L. R. R. Co.* v. *United States*, 245 Fed. 60 (C. C. A. 8), certiorari denied, 245 U. S. 666; *San Pedro, L. A. & S. L. R. R. Co.*

soning was applied by the Supreme Court of Washington in construing a State maximum hour statute in a case where the employer's contentions were remarkably similar to the contentions of petitioners here. *Davies* v. *City of Seattle*, 67 Wash. 532, 121 Pac. 987 (1912). The statute involved in the *Davies* case provided that—

> [a]ll work "by contract or day labor done" for it [the State], or any political subdivision created by its laws, shall be performed in work days of not more than eight hours each * * *.

The employees involved were teamsters performing day labor for the city street department. They were required each morning to go to the barns owned by the city, grease their wagons when

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v. *United States*, 213 Fed. 326, 329 (C. C. A. 8); *United States* v. *Denver & R. G. R. R. Co.*, 197 Fed. 629 (N. Mex.) *United States* v. *Illinois Cent. R. R. Co.*, 180 Fed. 630 (N. D. Iowa), and *United States* v. *Chicago, M. & P. S. Ry. Co.*, 195 Fed. 783 (W. D. Wash.).

See also *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154, 158, where this Court stated that "as a general rule, employment may be said to begin when the employee reaches the entrance to the employer's premises where the work is to be done * * *." It is recognized that employment under the workmen's compensation laws extends beyond employment for which wages are due. However, the above-quoted statement appears to have been an enunciation of the rule of general application, rather than of the broader rule applied in workmen's compensation cases. The particular injury involved occurred before the employee reached the entrance to the employer's premises.

necessary, hitch up their teams, collect their tools and, as the court said—

> be at the place of work, or, as the witnesses put it, "on the job," at eight o'clock a. m. * * * [67 Wash. at 533].

After working eight hours "on the job," the teamsters were required to return the teams to the barns and unhitch and unharness them. The time spent in going to and returning from "the job" ordinarily consumed one hour a day. The city there contended that the time so spent was simply "choring" or "preparation" for the day's work, and was not to be included within the activity prohibited by the law. But the Supreme Court of Washington, branding defendant's contention "a palpable evasion of the law," concluded (p. 535):

> If the excess time put in by respondents was not work, then the inquiry is, what is work and where is the dividing line?

Petitioners require their miners to report at the tally house precisely as the city of Seattle required the teamsters to report to its barns. The preliminary handling and hitching of the teams and wagons is further paralleled by the arrangement and transportation of tools and equipment. The teamsters were under orders of the city precisely as the miners are under the orders of the petitioners. In both situations, the time spent in getting from the place of reporting to the

place where the employee is of greatest benefit to the employer is not for the convenience or amusement of the employee; it is "choring" dedicated unqualifiedly to the interests of the employer."

The unreasonableness of petitioners' claim that only "productive" work should be compensable time, is nowhere better demonstrated than in the testimony of their efficiency engineer witness, Mr. Joseph Halfpenny, who devised and installed in petitioners' mines the incentive plan under which the more tonnage a man or crew mined, the lower

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[37] Petitioners (Tennessee br. p. 17) claim to find support for their position in some opinions of the Attorney General, and some "rulings" of the Comptroller General, regarding the application of statutes relating to the hours of work of certain Government employees or employees on public works. The reference to opinions of the Attorney General relates to two interdepartmental opinions, written 37 and 35 years ago, respectively, regarding the eight-hour law for public works (R. 4646, 4654). These are not concerned with mining or anything similar. In both cases it is clear that the disputed time was time which the employees could use for their own purposes and during which they were performing no services or duties incident to their work. The rulings of the Comptroller General relied on are concerned with the time spent by a railway postal clerk in traveling "from his *home*" to the place where he performs his duties (pltf. ex. 18, R. 4658), with Government employees on travel status (pltf. ex. 19, R. 4661), and with Government employees transported by special ferry to their place of work (pltf. ex. 45, R. 4669–4695). There was no "ruling" as to the third of these matters; indeed, the "interpretation" upon which petitioners have relied was actually reversed by the Comptroller General's office (R. 4691–4692). The facts as to none of them resembled those at bar.

became the tonnage rate of pay (R. 1789–1790). According to Mr. Halfpenny, studies made prior to the installation of his incentive plan showed that actually only "about one-half of the eight hours' work at the face was productive time * * * the rest of the time, 3.6 hours, was taken up with delays, with unnecessary things that were done, with overlapping, and so forth" (R. 1791). Carried to its logical extreme, the time consumed by the men in reaching over for tools, or in mopping the sweat from their brows, would not be compensable time.

The reasonableness and practicability of the "portal to portal" principle are attested by the fact that it has been applied in two of the great mining States, as well as in a number of foreign countries. Arizona, since 1912, and Utah, since 1937, have provided by statute that the eight-hour per day limitation upon work in underground mines encompasses all time spent underground; Nevada provides that the eight-hour limitation shall apply to travel one way.[38] Among the for-

[38] Ariz. Laws 1912, c. 28, secs. 2 and 3, p. 59, Ariz. Code Ann. (1939), vol. 4, sec. 56–115; Utah Laws (1937), c. 59, amending Rev. Stat. (1933), sec. 49–3–2; Nevada Comp. Laws (1929) sec. 10237. Wyoming provides however that its eight-hour law for miners "shall be construed to mean eight hours of actual labor and shall not include the time consumed in going to and returning from work." Wyoming Rev. Stat. (1931), 63–107. The Alaska statute is similar. Alaska Comp. Laws, Sec. 2132. As the Fair Labor Standards Act is not limited to one industry but is designed to provide the

eign countries (according to the reports of the International Labor Office), which prior to the current war applied in their coal mines a method of computing working time equivalent to the "portal to portal" basis, were: Austria, Belgium, British Columbia, Czechoslovakia, France, the Dombrava and Cracow areas of Poland. *The World Coal Mining Industry* (International Labor Office Studies and Reports, series B, no. 31, 1938, vol. II, pp. 254–258; *Reduction of Hours of Work* (International Labor Conference, Report no. 4), vol. V: Coal Mines (1935), pp. 31–32. In the Netherlands, the Upper Silesian Region of Poland, Alberta, Canada, Spain and some parts of France, according to these same reports, the computation of underground hours included one period of ascent or descent. In Great Britain, where wages are paid on a shift or collective basis, the shift begins when the last worker of the group enters the cage to descend, and ends when the first worker leaves the cage on returning to the surface. A shift of workmen includes the

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standard for every kind of work, the absence of an explicit provision as to working time in underground mines does not have the significance which petitioners seek to attach to it (see Tennessee Company br., pp. 15, 58). It is no more reasonable to infer that Congress would have expressly adopted the "portal to portal" basis had it intended to include underground travel as working time than it is to presume that Congress would have expressly adopted the "face to face" basis had it intended to exclude travel time. Compare the Wyoming and Alaska statutes, *supra*.

number of workmen whose hours for beginning and terminating work in the mine are approximately the same. (Coal Mines Regulation Act 1908, 8 Edw. 7, ch. 57). Within these limits, travel time is included in working time. We have been advised that the time thus included is the equivalent of one-half of the total travel time. That the "portal to portal" basis of payment is the more humane and progressive practice has been recognized by the International Labor Conference in the adoption of the Hours of Work (Coal Mines) Convention of 1935.[39]

[39] International Labour Code (1939), pp. 81, 83. Article 3 of the Convention provided: "Hours of work in underground hard coal mines means the time spent in the mine, calculated as follows—(a) time spent in an underground mine means the period between the time when the worker enters the cage in order to descend and the time when he leaves the cage after reascending; (b) in mines where access is by an adit the time spent in the mine means the period between the time when the worker passes through the entrance of the adit and the time of his return to the surface" (*id.* at 83). This Convention was ratified by Cuba and Mexico but was not to go into force until six months after the registration of ratification by at least two of the following countries: Belgium, Czechoslovakia, France, Germany, Great Britain, Netherlands, and Poland. No additional ratifications had been registered up to the time of the outbreak of the war (*id.* p. 81, footnote 1).

II

THE STATUTORY REQUIREMENT CANNOT BE SET ASIDE BY CUSTOM OR AGREEMENT. IN ANY EVENT, THERE HAS BEEN NO ESTABLISHED "FACE TO FACE" CUSTOM IN PETITIONERS' MINES, NOR HAS ANY SUCH PRACTICE BEEN ESTABLISHED BY BONA FIDE COLLECTIVE BARGAINING AGREEMENT

Petitioners cannot dispute the fact that the underground travel in their mines is a difficult, disagreeable, and perilous part of the miner's job essential to the owners' business of producing ore. Their briefs do not seriously attempt to attack the finding of the District Court that the travel time "bears in a substantial degree every indicia of worktime: supervision by the employer, physical and mental exertion, activity necessary to be performed for the employers' benefit, and conditions peculiar to the occupation of mining" (R. 503). Petitioners have sought to obscure these essential facts by drawing attention to a mass of evidence supposedly establishing a "traditional practice," supported by a history of collective bargaining agreement, not to pay for this time. They have not restricted themselves to the practices and collective bargaining agreements in their own Alabama operations, but have undertaken to prove the practices in their own mines by adducing in vast detail evidence of the customs and collective bargaining agreements in other mines and other

industries, particularly in the bituminous coal mines.

They seek to justify such procedure on the ground that, since the statute contains no specific provision regarding underground travel in mines, it is ambiguous, and therefore it must be assumed that Congress intended to perpetuate the existing customs or to leave the matter to be determined by agreements between the mine operators and their employees.[46] But no such significance can be attached to the absence of particularity in a statute of such general application, designed to provide the irreducible minimum standard for a variety of industries. In any event, if customs or agreements were to be given weight, the practices of greatest weight would be those in petitioners' own mines in Alabama and not customs, practices, and conditions in the bituminous coal or other industries elsewhere.

A. THE REQUIREMENT OF THE STATUTE THAT COMPENSATION BE PAID FOR ALL EMPLOYMENT CANNOT BE AVOIDED BY CUSTOM OR AGREEMENT

Petitioners' argument for introducing the mass of evidence on custom, is, as previously stated, that the absence of an express provision in the statute with respect to underground travel creates

[46] Where Congress intended to permit the Act's basic overtime requirements to be modified through collective bargaining agreements, it specifically so provided. See Section 7 (b).

an ambiguity and requires resort to extraneous evidence as to the intent of Congress. The basic fallacy of this reasoning lies in the significance which petitioners attach to the absence of specific treatment in the statute of underground travel. We think that the Circuit Court of Appeals conclusively answered petitioners' contention by pointing out with respect to the statutory provisions in question that (R. 5002):

> The legislative intent is clear but it is expressed in general terms and does not extend to particular instances. The myriads of circumstances in which it would be necessary to determine working time in individual cases or classes of cases could not be covered with particularity by statute.

It need not be denied that the determination of when a man is at work or employed may be difficult in some factual situations near the borderline. But the record in this case shows that this is no borderline case; that the miners are actually at work and subject to the control and supervision of petitioners during the underground travel. Under the circumstances, it would indeed be "a mockery of the beneficent purpose of the Act" (see decision of the District Court, R. 499), to construe the overtime requirement to incorporate a custom or agreement not to pay the miners for such working time. An agreement to accept less than the statute requires or a custom at variance with a statutory right is

void. *United States* v. *Morley Construction Co.*, 98 F. (2d), 781, 788 (C. C. A. 2), certiorari denied *sub nom. Maryland Casualty Co.* v. *United States*, 305 U. S. 651; *Waterman S. S. Corp.* v. *National Labor Relations Board*, 119 F. (2d) 760, 762 (C. C. A. 5); *Fleming* v. *Warshawsky & Co.*, 123 F. (2d) 622 (C. C. A. 7); *Johnson* v. *Dierks Lumber & Coal Co.*, 130 F. (2d) 115 (C. C. A. 8). In the words of the Eighth Circuit in the last cited case, "We do not think the act means that an employer may claim all of an employee's time and compensate him for only a part of it" (p. 120). A practice or custom pursuant to which employees were paid only for shoveling ore, for example, but not for shoveling rock or dirt, obviously would not prevent the latter from being work within the meaning of the Act.

Petitioners make a particular point of the Administrator's press release (issued in July 1940 by former Administrator Philip B. Fleming) relating to his enforcement policy in the bituminous coal mining industry, in which he stated that he would "accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in the particular industry and are supported by a long history of bona fide collective bargaining agreements" (Plaintiff's Exhibit for Identification No. 4–B, R. 4716–4717). As appears from the record, the factors upon which the

Administrator based his coal-mining enforcement policy were not present in petitioners' mines (see Statement, pp. 33–34, *supra*). Moreover, the release in question shows on its face that it was only an informal declaration made by the Administrator for enforcement purposes with respect to a particular practical problem. If, however, the declaration of the Administrator's coal enforcement policy should be regarded as a legal interpretation, we think it was wrong to the extent that it may be inconsistent with the decisions of the courts below.

Petitioners have adverted to the fact that the coal policy has never been retracted or changed by the Administrator (Tennessee brief, p. 18). In view of this statement, it should be said on behalf of the present Administrator that his inaction is attributable, not to continued approval under present circumstances of the previously announced coal policy, but to his reluctance to do or say anything which might be construed as an attempt to influence the present litigation. Moreover, the Administrator's informal action with respect to bituminous coal mining can be of little assistance to the court in determining the issue here. Were his coal policy irreconcilable with his metal mining ruling, the latter is the action applicable to this case. He has participated in this case and advocated the correctness of the position taken by the court below.

B. THERE HAS BEEN NO ESTABLISHED "FACE TO FACE" CUSTOM IN PETITIONERS' MINES, NOR HAS ANY SUCH PRACTICE BEEN ESTABLISHED BY BONA FIDE COLLECTIVE BARGAINING

It is not without reason that petitioners have placed far greater emphasis on the practices and collective bargaining history in the bituminous coal industry than they have upon practices and conditions in their own mines.[41] Emerging from the mass of evidence is the clear fact that there has been no custom in petitioners' mines to pay for or to compute working time on a "face to face" basis,[42] and no collective bargaining history sup-

[41] Most of the events, practices, and contracts relied on by petitioners relate to coal mining (see Tennessee Company br. pp. 18–25). In the metal mining industry there has been diversity of practice as to the past method of payment (R. 86–89). The report to the Administrator states (R. 88–89):

"From the foregoing summary it is apparent that there is no nation-wide practice concerning hours worked in underground metal mines. In a few localities, the practice is fairly uniform, but generally it varies greatly even within the boundaries of a single state. Furthermore, existing methods of payment have been arrived at in part by unilateral employer action. * * * The great majority of metal miners nowadays work in mines where they are paid for part or all of their underground travel time."

Even apart from the practice in petitioners' mines, this would lead to the conclusion that the question could not be determined by "custom," inasmuch as Congress undoubtedly did not intend that in an industry with diverse practices, each employer could establish his own definition of hours worked.

[42] We do not mean by this that petitioners' employees have previously been paid for travel time, but that they have not been paid on the basis of hours worked, at the face or elsewhere, at all.

porting any such custom. Petitioners' statements that the "undisputed evidence shows the existence" of such a practice and that this practice was established not only by "immemorial custom" but also by collective bargaining agreements between petitioners and their employees allegedly "represented by strong national unions" (Tennessee br. p. 18) cannot be supported. This is evident from the review of the evidence in the Statement (*supra*, pp. 18–32).

Alabama mining operations in the last 40 or 50 years have undergone many and radical changes (R. 985–1029). In the '70's, at the beginning of commercial operations on Red Mountain, the ore was stripped by hand from outcrop workings, with pick and shovel, and hauled in wheelbarrows (R. 1025, 1121). Then, when stripping and open pit mining became uneconomical, slopes were driven beneath the surface, and mining operations changed to the stope system as slopes were driven underground. At first the mines were only a few hundred feet deep and the miners could quickly and easily walk from the surface into their "working places" (R. 986, 1028), but as the headings advanced it was necessary to install skips and to transport both men and ore (R. 1028). Extractive methods at the same time altered to keep pace with scientific development. Through the use of ever increasing mechanization, the productivity of the miners increased (R. 1030). The hours of

labor gradually were reduced and wage rates varied through the years, adjusting themselves to changes in economic conditions (R. 1030).

In this industry, characterized by development and change, petitioners find a single timeless factor. The method by which the miners' hours of work and rates of pay were computed, they assert, is today precisely the same as it was in the days of the mule and the fist mucker. One thing which is clear from the evidence adduced at the trial is that up until the time the Fair Labor Standards Act was passed in 1938 (if not thereafter), not one of the petitioner companies was ever concerned with the accurate measurement of the amount of time spent by its underground employees at what petitioners term "working places." Whether paid on a so-called "contract basis," a "tonnage basis," a "task basis," or the so-called "ten-hour day" and "eight-hour day" basis, both the productive miners and the service crews have been compensated without regard to the number of hours which they actually devoted to their employers either at the "working face" or from the time they arrived at the portal until the time they left the mines.

Under the "contract system" the amount of time actually consumed by a crew in producing ore was entirely immaterial (*supra*, p. 20). Whether the miners spent six or nine "productive" hours, they were paid without regard to the

time consumed but simply in relation to the amount of tonnage produced (*supra*, pp. 21–22). The only distinction which petitioners' witnesses were able to point out between the "contract system" and the "task" or "pay day" system was that under the latter a certain minimum tonnage or task was established by the company which was intended to serve as a quota or measure of the average day's work (*supra*, p. 20). The method of payment, however, remained strictly on a tonnage basis and so long as a miner completed his task it was immaterial whether he remained at the face either half a day or a full day. His earnings bore direct relation, not to his time, but to his production (*supra*, pp. 21–22). The so-called "ten-hour day" or "eight-hour day" system likewise had no real relation to the time spent by the miners at their "working places" (see Statement, *supra*, pp. 20–23, 24–25). Accordingly, to speak of computing wages or time worked on either a "face to face" or "portal to portal" basis is both artificial and incorrect.

Petitioners' contention that the "face to face" custom has been established by collective bargaining agreements between petitioners and their employees is also without foundation. In the light of the facts summarized in the Statement, *supra*, pp. 25–32, petitioners may not speak of their "History of collective bargaining." The record shows that prior to the enactment of the Fair

Labor Standards Act petitioners had not recognized any labor organization as the representative of their employees." To speak of petitioners' methods of paying wages, their incentive plans, and their contracts with company-dominated unions as a collective bargaining history (Republic br., p. 8) is to wander into the realm of the unreal. The record reveals the repeated attempts by the employees to secure pay for their underground travel and the uniformly customary refusal by petitioners. The history of labor relations in petitioners' mines, prior to the enactment of the Wagner Act and the Fair Labor Standards Act guaranteeing them certain basic rights, was such that "there is grim irony in speaking of the freedom of contract" or of voluntary acceptance of the alleged "face to face" plan by employees who, "because of their economic necessities," had been forced to labor for petitioners regardless of the kind of working conditions or the wages which they received. *Morehead* v. *Tipaldo*, 298 U. S. 587, 632; *Holden* v. *Hardy*, 169 U. S. 366, 397. The District Court found that "the evidence clearly established that the method of payments of

" The fact that two of petitioners entered into contracts with the unions after the passage of the Act (see pp. 26, 32, *supra*) is hardly sufficient to establish a custom existing when the Act was passed. Furthermore, as we have shown (*supra*, pp. 22–23, 32), the definition in the 1938 and 1939 agreements of working time as time "at the usual working place" (R. 107) did not mean that the men were actually paid on the basis of time spent at the face.

wages were dictated almost entirely by the employers," that the "employees worked on the best terms they could obtain and the fact that they could not obtain terms that would compensate them for time spent in traveling underground to and from their working stations does not indicate that they did not consider that time as working time" (R. 498). The court further found that "Prior to the enactment of the Fair Labor Standards Act of 1938, iron ore miners repeatedly made efforts to obtain full, or at least a partial, compensation for so-called travel time" (*ibid.*). The contracts on which the petitioners here rely were essentially the result of a situation where "the proprietors lay down the rules and the laborers are practically constrained to obey them" (169 U. S., at 397).

As the District Court pointed out, the fact that the miners were unsuccessful in their efforts to secure payment for travel time "does not determine that they were erroneous in their contention that such time was work time, nor does it determine that Congress, in using the phraseology of Section 7 of the Act, adopted the prevailing method of payment. * * * It would be no more reasonable to assume that Congress * * * adopted the employer's formula than to assume that Congress intended to remedy the practice so far as it may have denied compensation for actual work" (*ibid.*)

CONCLUSION

The ruling of the courts below that the time spent by the miners in underground travel constitutes employment and working time, within the scope of Section 7 of the Act, is correct and should be affirmed.

Respectfully submitted.

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